BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY C. WHITING Claimant	)	
VS.	)	
STERLING DRILLING CO., INC. Respondent	)	Docket No. **1,040,990**
AND	)	
LM INSURANCE CORP. Insurance Carrier	)	

ORDER

Claimant requests review of the June 23, 2009 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) found claimant was working at a fixed location and was traveling home at the end of the work day when he was involved in an automobile accident and therefore his claim was barred by the "going and coming" rule of K.S.A. 44-508(f).

Claimant requests review and argues that travel was an integral part of his employment and consequently his accidental injury was not barred by the "going and coming" rule.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as an oil driller and he lived in Ellinwood, Kansas. In June 2008 claimant was working on an oil rig two miles east of Luka and a mile north which was

in Pratt County. Claimant was in charge of the crew of three which included a derrick hand and two floor hands. He also transported the two floor hands who lived in Great Bend to the rig site and respondent paid claimant 42 cents a mile but did not pay for the time it took to travel to the rig site.

Claimant testified that on June 5, 2008, he did not transport any crew members to the rig site since it was their day off and the relief crew members provided their own transportation to the rig site. But claimant still received 42 cents a mile even though he was not transporting any crew members on that day.

Claimant started his shift at 11 p.m. on June 4th and ended it on June 5th at 7 a.m. After changing his clothes, he headed home on June 5, 2008. Claimant was driving his own vehicle when he fell asleep, went off the road and hit a telephone pole. He testified that he injured his left hip, knee and right shoulder in the accident. Claimant walked approximately a quarter of a mile when he was picked up by the Stafford Sheriff's department and returned to the accident scene. An ambulance transported claimant to Central Kansas Medical Center in Great Bend, Kansas. He was admitted for a couple of days and then released. Claimant continued to follow-up with Dr. James McReynolds.

Claimant testified he injured both legs, feet, left knee, right shoulder and left hip as well as his lower back. He has not worked since the accident. Claimant applied for and is currently receiving Social Security disability.

The respondent denied the claim arose out of his employment. Because the accident occurred after claimant had left work for the day, the respondent argued the "going and coming" rule, K.S.A. 2008 Supp. 44-508(f), specifically precludes a finding that the accident arose out of and in the course of employment.

K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[1] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[2]

The "going and coming" rule does not apply if the worker is injured on the employer's premises.[3] Nor is it applicable when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[4]

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[5]

In *Messenger*, the Court noted in Syllabus 4:

> In a workers' compensation case, the record is examined, and it is *held*, that where (1) employees are required to travel and to provide their own transportation, (2) the employees are compensated for this travel, and (3) both the employer and employees are benefited by this arrangement, then such travel is a necessary incident to the employment, and there is a causal relationship between such employment and an accident occurring during such travels; thus, the "going and

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[1] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[2] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[3] *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[4] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[5] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

coming" rule, K.S.A. 1983 Supp. 44-508(f), does not apply, and the trial court correctly awarded compensation.[6]

In *Messenger*, the claimant was killed in a truck accident while on the way home from a distant drilling site. A key factor in *Messenger* was that the employer actively sought persons who were willing to work at "mobile sites." As the respondent was in the practice of paying drillers to drive to far away points, providing an entire crew with transportation was customary.[7] Additionally, testimony in *Messenger* indicated that the company received a definite benefit when hiring crew members who agreed to travel, as the drilling company did not attempt to hire team members who lived near each drilling site, but instead expected the existing crews to travel to the drilling sites. In *Messenger*, the employees were found to have no permanent work site, but were required to travel to distant locations. As that was the common and accepted practice in the oil field business where Messenger was employed, the claimant's death was found to arise out of and in the course of his employment.

In this instance, the ALJ determined that because claimant was working at a fixed location his travel home at the end of the day was subject to the "going and coming" rule in K.S.A. 2008 Supp. 44-508(f). In *Butera*, the Kansas Court of Appeals held that driving to and from a regular job site is not considered an integral part of the job for a worker who has temporarily relocated and established long-term lodging convenient to a remote job site distant from his home. This case is distinguishable because here claimant would drive to various job sites and was paid mileage for such travel on a daily basis. Whereas, in *Butera,* the claimant was not paid for travel after he found lodging near the remote job site. It was noted that if Butera had been injured on a trip to the work site to set up a residence and for which he was paid a mileage rate such trips would be specially treated and likely compensable. Because claimant was paid for his daily trip to work, such trips were specially treated. Moreover, the fact claimant commuted to and from his home each day is not controlling upon a determination that travel was an integral part of his employment.[8]

In this case the claimant was required to provide his own vehicle to travel to the drilling job site and was paid mileage for the travel. And claimant would frequently transport other members of the drilling crew to the rig site. This Board Member concludes that this case is analogous to *Messenger* and finds that travel was an integral part of

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[6] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435.

[7] *Id.* at 439.

[8] See, *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004); *Kindel v. Ferco Rental Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

claimant's employment with respondent. Consequently, K.S.A. 2008 Supp. 44-508(f) does not bar his claim.

Respondent argues that the exception to the "going and coming" rule for cases where travel is integral to the employment is no longer good law because of recent decisions which indicate the plain language of a statute should be adopted. However, in the recent *Halford*[9] case the Court of Appeals restated and adopted the rationale of *Blair*[10] in the following fashion:

> As emphasized by our court in *Mendoza* and *Brobst,* this exception extends to the normal risks involved in completing the task or travel, and the required perspective is to view the task or trip as unitary or indivisible, meaning an injury during any aspect thereof is compensable. See *Blair v. Shaw,* 171 Kan. 524, 528, 233 P.2d 731 (1951) (entire trip by mechanics from annual certification test was integral to employment, causing deaths during trip to be compensable). So long as the employee's trip or task is an integral or necessary part of the employment, this exception applies to assure compensability for an injury suffered *during any portion of such trip or task.* See *Kindel,* 258 Kan. at 277.

This decision seemingly refutes respondent's argument that the Court of Appeals would not extend the application of a judicially created exception to a statute in light of the strict construction language in the *Casco*[11] decision.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated June 23, 2009, is reversed and the case is remanded for further proceedings, if necessary, to address the claimant's requests for medical treatment and temporary total disability benefits.

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[9] *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).

[10] *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951).

[11] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *rehearing denied* (May 8, 2007).

[12] K.S.A. 44-534a.

[13] K.S.A. 2008 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this 28th day of August 2009.

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DAVID A. SHUFELT
BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge